

Records and the Public Interest
The shredding of the "Heiner" documents: An appreciation
Chris Hurley

Abstract

Government archives authorities have a discretion to allow or forbid the destruction of public records. Should they exercise this discretion to safeguard the rights and entitlements of private citizens or only on "historical" grounds? Should government archivists prevent hasty destruction of official documents which may provide evidence of government liability or wrong-doing? Who determines the public interest in retention and balances individual concerns against public benefit?

These and related questions were raised in the Report of the Senate Select Committee on Unresolved Whistleblower Cases entitled *The Public Interest Revisited*, published in October 1995. The Report dealt, inter alia, with the "Shredding of the Heiner Documents" in Queensland. In the course of the Senate's Inquiry, Queensland authorities argued that it was no business of the State Archivist to be concerned with disposal other than to determine what documents should be kept for reasons "of historical public interest".

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Introduction

In 1993, a Queensland Senate Select Committee on Public Interest Whistleblowing was established whose report, entitled *In the Public Interest*, was tabled in August 1994. The report recommended State action on a number of unresolved whistleblower cases in the State. In response to a letter from the Committee's Chair, requesting State Premiers and Territory Chief Ministers to consider the Committee's recommendations and the need for complementary State and federal legislation, Queensland's Premier, Wayne Goss, replied, inter alia, that the State would take no further action on the unresolved cases.

The Senate responded by establishing a Select Committee on Unresolved Whistleblower Cases in December, 1994. This Committee completed its work by publishing a report entitled *The Public Interest Revisited* in October 1995. One of the unresolved cases investigated by the Committee involved shredding of official documents. The case is generally referred to as "The Shredding of the Heiner Documents". Although not central to the case, the question of the circumstances in which a State Archivist should approve destruction of public records was a major issue for consideration.

The Queensland Government refused to co-operate with the Senate Inquiry, though it did supply directly or indirectly much of the documentary material which is now published in appendices to the Committee's Report. The Queensland Criminal Justice Commission (QCJC), however, did appear and give evidence.

The Commission's involvement comes about because it dealt with some of the Whistleblower cases, including the Heiner documents case. In part, the Queensland Government's refusal to participate was based on a view that the QCJC was the appropriate body to deal with these cases and had already done so. Dissatisfied whistleblowers called into question the adequacy

of the QCJC's methods and conclusions. Because the QCJC did appear, give evidence, and submit itself to examination by the Committee, the Senate Inquiry became, to some extent, a review of the QCJC's handling of the cases referred to the Committee.

Neither the Australian Society of Archivists (ASA) nor the Records Management Association of Australia (RMAA) made submission to or gave evidence before the Senate Committee. Yet the issues canvassed are of great professional significance.

1.0 Background

The Heiner documents were the records of interview and related material gathered by retired stipendiary magistrate Noel Heiner in the course of an aborted inquiry into the John Oxley Youth Centre, Wacol, and its manager, Mr Peter Coyne, in late 1989 and early 1990; they were shredded on the order of the Queensland Cabinet on March 23, 1990.

1.1 Here is a cast of characters:

Peter Coyne: Manager of the John Oxley Youth Centre (JOYC). In early 1990, immediately upon termination of Stipendiary Magistrate Heiner's inquiry, he was seconded out of the JOYC onto a "special project". He sought access to the Heiner documents through his solicitors and union, the Queensland Professional Officers' Association (QPOA), and advised the Queensland Department of Family Services and Aboriginal and Islander Affairs (DFSAIA) through his solicitor that he was intending to institute legal proceedings. One year later, he accepted a redundancy package.

Noel Heiner: Began investigations in November 1989 and indicated he was not prepared to continue in January 1990. Documents made and received in the course of his investigations were handed over to DFSAIA and sealed in January 1990. Sealed material was then transferred from DFSAIA to Cabinet secretariat in "a somewhat unusual development". He received indemnity from litigation expenses by Cabinet.

Kevin Lindeberg: Senior Organiser/Media/Publicity Officer with the Queensland Professional Officers' Association for six years who initially handled Peter Coyne's case. In mid-1990, he was dismissed from the QPOA. One of the reasons given by the QPOA for his dismissal was his handling of the Coyne case after the Minister for the DFSAIA complained that he was "overly-confrontationalist and inappropriate" in his negotiations.

Ms Lee McGregor: State Archivist. Her approval for the destruction of the Heiner documents was sought by Cabinet official Stuart Tait on February 23, 1990 and was given "apparently ... within a few hours".

Ms Ruth Matchett: Acting Director-General of the Queensland Department of Family Services and Aboriginal and Islander Affairs (DFSAIA) which replaced the Department of Family Affairs following the Queensland change of government in December 1989 and terminated the Noel Heiner's Inquiry in February 1990. She resigned in mid-1995.

Kenneth O'Shea: Queensland Crown Solicitor. In January 1990, his advice was sought on the manner in which the Inquiry had been set up and on Heiner's powers and indemnities. He advised that Heiner and his informants might not be immune from legal action for defamation.

Alan Pettigrew: Director-General of the Queensland Department of Family Services (DFS), the predecessor of the DFSAIA, which initiated the Heiner Inquiry after a meeting involving Janine Walker.

Stuart Tait: Acting Cabinet Secretary in early 1990. Sought approval from the Queensland State Archivist for the destruction of the Heiner Inquiry documents after taking advice from the Crown Solicitor, Kenneth O'Shea.

Ms Janine Walker: Industrial Relations Director of the Queensland State Services Union (QSSU) some of whose members were concerned about the management of the JOYC. She urged establishment of the Inquiry and handed written complaints to Alan Pettigrew.

Ms Anne Warner: Minister in the Goss Labour Government responsible for the DFSAIA. Retired at the July 1995 State election.

1.2 What follows is a selected chronology :

1989

September 14: Officers of the DFS meet Janine Walker

November 22: Heiner Inquiry commences

December 2: Queensland State Election. New Labour Government elected.

1990

January 11: Peter Coyne gives evidence to Noel Heiner.

January 15: Coyne seeks copies of documentation from Ruth Matchett.

January 17: Coyne's solicitors complain to Ms Matchett - denial of natural justice.

January 18: Coyne again seeks copies of documentation from Ms Matchett. Kenneth O'Shea advises her on whether the Inquiry should continue.

January 19: Lindeberg, Ms Walker and Ms Matchett meet. After discussions with Ms Matchett, Heiner declines to continue. O'Shea advises further on whether the Inquiry should continue.

January 23: O'Shea advises further on whether the Inquiry should continue.

January 29: The QPOA complains Coyne has been denied natural justice and seeks access to original complaints against Coyne.

February 7: Ms Matchett writes to Heiner terminating Inquiry.

February 8: Coyne's solicitors seek access to documentation from Ms Matchett.

February 13: Ms Matchett transfers Coyne to a special project at Head Office. Cabinet Secretary Stuart Tait seeks O'Shea's advice on disposition of documents.

February 14: Coyne's solicitors advise of legal action to obtain access.

February 16: O'Shea advises that Archives approval must be given

February 23: Cabinet seeks State Archives approval for destruction. State Archives approval for destruction given.

March 5: Cabinet decides to destroy records.

March 23: Records destroyed.

May 30: Lindeberg dismissed from QPOA, then re-instated.

August 7: Lindeberg dismissed from QPOA, not re-instated.

2.0 ISSUE ONE : Does the Archives have "unfettered" discretion in deciding on disposal of Official Records?

2.1 In common with most State archives laws, the Queensland Libraries and Archives Act 1988 gives the archives authority power to determine whether records proposed for destruction should be retained or destroyed. In Queensland, this discretion resides with the State Archivist.

2.2 In some other States (and in the Commonwealth), the person who acts as archives authority is both a "statutory officer" (occupying a position established by an Act of Parliament) and a public servant subject to control and direction by the normal departmental processes and hence, ultimately, by a Minister of the Crown. A conflict can arise between a responsibility to

exercise statutory duties independently and compliance with directions given by the statutory officer's superiors.

2.3 In New South Wales, the Archives Authority is a board and it has a measure of independence common to statutory bodies because they are composed of persons who are not subject to public service discipline. This is undoubtedly enhanced by the presence on the Authority of a judge of the New South Wales Supreme Court. In Tasmania, the archives legislation specifically exempts the archivist from direction by departmental superiors or by the minister in the exercise of the disposal discretion.

2.4 In other States (e.g. Victoria and Queensland), it can be asked whether the discretion of the archivist when dealing with departmental requests is in any sense "controlled" by the minister (responsible for archives matters) or the departmental superiors of the archivist. In other words, must the archivist approve a destruction request if told to do so by his or her superiors?

2.5 No statutory discretion is wholly unfettered. At the very least, the discretion must be exercised in accordance with administrative law and is normally subject to judicial and/or administrative review - if it is claimed, for example, that the discretion has been exercised in an unlawful or improper manner. A discretion must be exercised properly and lawfully and courts will intervene if it is not.

2.6 Intervention by a court in the exercise of a statutory discretion is usually (but not always) concerned with the manner in which a discretion is exercised rather than the merits of the decision. Alternatively, an exercise of discretion may be subject to review or revision - typically on appeal to a tribunal or higher authority. Such an appeal is usually (but not always) concerned with the merits of the decision rather than the process.

2.7 The Queensland Government's actions have been defended by the QCJC whose representative, **Michael Barnes**, has asserted that :

1. The role of the Queensland State Archives (QSA) is to assess the "historical value" of the records, and
2. It is no business of QSA to consider other issues (such as the interest of citizens in availability of records in possible legal proceedings) when exercising that discretion.

The Queensland Government's actions have also been defended by the Queensland Crown Solicitor, **K. M. O'Shea**, who argued that :

1. Government has a right to destroy "its own property" (public records) "in accordance with a Statutory regime which permitted ... destruction (the *Libraries and Archives Act, 1988*)", and
2. There is no statutory obligation on the Government or the Archivist to consider, before destroying records, the implications of legal proceedings which have been "threatened" but not yet instituted.

2.8 One of the grounds on which a court may intervene is if an authority improperly purports to fetter a discretion conferred upon it. The key question here is what purpose does the approval of the QSA serve.

2.9 The net effect of defending the Government's right to destroy public records subject only to review by QSA and then limiting QSA to a consideration of historical value is to liberate the Queensland Government from potential constraints on disposal actions where destruction would have adverse results for any citizens except historians. QSA would thus be prevented from giving consideration or weight to any reasons it might find for preventing destruction of public records apart from the needs of "history".

2.10 It is arguable that acceptance of the QCJC's view would amount to a "fettering" of QSA's discretion by imposing a policy or rule which precludes consideration of all relevant factors. Insisting that matters other than historical value have "nothing to do with the archivist" and limiting QSA's consideration of reasons for withholding consent to that issue only improperly limits the exercise of a discretion conferred by Parliament without any such restrictions being imposed.

2.11 The Crown Solicitor, on the other hand, argued that the Archivist had a "wide" discretion and could presumably consider anything she pleased. Conversely, within the terms of O'Shea's expressed opinions (at any rate those which are published), there was no obligation for her to take account of anything when reaching a decision. But this would amount to saying that Parliament had no particular purpose in mind when conferring the discretion and that the Archivist may please herself. It is doubtful if any court would uphold such a view of discretionary power.

2.12 The Archivist's discretion acts as a brake on Government (which, according to O'Shea, has no obligation of solicitude for citizens like Coyne in their pursuit of justice). The removal of that brake (by recklessly detaching its exercise from any sense of the purpose for which it was conferred) would have adverse consequences for those who may look to it for protection. This was the view taken by counsel for the Queensland whistleblowers:

"This matter is deeply concerning ... because it represents a real threat to the security of evidence (in this case public records) required in foreseeable and foreshadowed litigation ... It potentially gives our state Archivist greater power than any court to decide what records may or may not be preserved if she/he is oblivious to statutory and legal demands on documents when deciding whether or not to destroy them."

2.13 Crown Solicitor O'Shea does not express an opinion on what purposes are served by the exercise of the Archivist's discretion (i.e. what factors she must take into account when reaching a decision and whether she too can safely ignore the wishes of citizens like Coyne to seek justice in the courts). O'Shea is clear, however, that in his opinion Coyne's pursuit of the documents posed no obstacle to the Government in seeking to destroy the records. The only obstacle was the need to obtain the Archivist's permission. It follows that, within the boundaries of the Crown Solicitor's opinions on the matter, if there was an obligation or duty on anyone to consider Coyne's interests (and O'Shea does not say that there was) then that obligation or duty can only have rested with the State Archivist.

2.14 In the absence of any evidence of what passed through Lee McGregor's mind on or about February 23, 1990, when she was asked for and gave a decision, no one can say what factors she considered or what weight she gave to them. The only thing upon which there appears to be universal agreement is that she was not aware that Coyne and his solicitors were seeking the records and wanted to use them to mount a case in court.

2.15 Should it be established that a consideration of Coyne's interest in the records was relevant to the exercise of the archivist's discretion, two further issues arise :

1. Did the Archivist take all reasonable steps to satisfy herself on this and all similar considerations?
2. Was the Cabinet Office at fault in not informing the Archivist of Coyne's interest in the records when seeking approval for destruction?

A similar (but not identical) issue arises for the Archivist if it is held that her discretion requires her to consider the implications of destruction for potential litigants in general (as a class) but not in particular cases.

2.16 The Queensland Crown Solicitor, Mr O'Shea, and spokesman for the QCJC, Mr Barnes, argued that the Queensland Government was under no legal obligation to consider the wishes of "potential" litigants - only the rights of participants in proceedings already under way (rights

which are in any case already protected not by the archival discretion but by the criminal law). O'Shea argued that the Government's only obligation was to obtain the QSA's prior consent. The QCJC argued that consideration of the interests of potential litigants in retention of records was irrelevant to the QSA's decision to approve a request for destruction.

2.17 If both these arguments are accepted, no-one needed to consider the interests of citizens trying to get access to justice in the courts - neither the Queensland Government (because legal action had not actually commenced and it was QSA's job to decide on retention/ destruction) nor QSA (because its business was to consider historical value only). The alternative view is that, before agreeing to a request for destruction, QSA (like any archives) should consider all of the uses to which records may be put in securing, inter alia, the rights and entitlements of citizens (including the right to take the Government to court).

2.18 If this wider view of the purpose of archival discretion is accepted, the QSA's approval can be criticised if it can be shown to have failed to take account of all relevant matters and the QCJC's evaluation of the case can be criticised for failing to deal with this aspect of the affair. Instead of "having greater power than any court", the QSA is then seen to have a discretion which is exercisable subject to the requirement to take into account all relevant issues not just "historical value" and its decisions can be examined and, if necessary, criticised for any failure to take account of other possible reasons for refusing requests for destruction.

3.0 ISSUE TWO: Is the Archives obliged to obey Government direction in disposal cases?

3.1 The general rule is that an authority should not act under the dictation of another.

[809] ... In *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689, a liquor licensing commission with a discretionary power to cancel liquor licences cancelled the plaintiff's licence at the command of the Premier of Quebec. The Supreme Court of Canada held that the power of cancellation belonged to the commission alone and could not be exercised at the dictation of another.

[810] It is not necessary to show that the third party intended to dictate. It is enough that the authority feels itself compelled to act in accordance with the other's assumed wishes ... While an authority must not accept dictation from others it is perfectly proper for it to take the opinions of other authorities into account. The line between these two processes may not always be easy to draw. In *R v Anderson*; *Ex parte IPEC-Air Pty Ltd* (1965) 113 CLR 177, the Director-General of Civil Aviation had power to grant permits for the importation of aircraft into Australia. On one application he sought the views of the government which, through the Minister of Civil Aviation, indicated that it was opposed to the importation. The High Court refused to disturb the Director-General's decision not to grant a permit. Windeyer J (at 204) so held on the ground that it was proper for the Director-General to obey the government, and Taylor and Owen JJ (at 200) on the ground that he had merely taken account of the government's wishes. Kitto and Menzies JJ dissented (at 192, 202). They held that the Director-General had improperly acted under dictation.

3.2 An authority may, therefore, "have regard" to the wishes of the Government in a particular case when exercising a discretion - the issue of a licence or import permit or the destruction of a set of records - but the weight of opinion appears to oppose the view that the Archivist must "obey" the Government in such cases.

3.3 On the other hand, public servants exercising statutory discretion are also subject to the discipline of administrative control:

[812] The courts take account of the realities of modern government so that when power is given to a civil servant the courts may be ready to imply a right or even a duty to accept directions on governmental policy from ministers. This view was taken by Kitto J (at 192) and Windeyer J (at 204) in the *IPEC* case and has been supported (obiter) by a majority of the judges in the High Court of Australia in *Ansett Transport Industries (Operations) Pty Ltd v*

Commonwealth (1978) 17 ALR 513 ... in the course of their judgements, the judges considered the question whether the secretary, a public servant, could be bound to exercise his discretion in accordance with directions by the government. Barwick CJ, Gibbs, Murphy and Aickin JJ recognized that, at least in some circumstances, a public servant could be required to exercise his discretion in accordance with a governmental policy direction. Mason J disagreed and took the view that though the official could take governmental policy into account, he could not abdicate his responsibility by acting on directions by a minister.

On the establishment of particular facts, Mason J's view no doubt represents the law, but where the decision has an element of governmental policy the weight of authority now recognizes that that element can be the subject of lawful dictation by ministers.

3.4 It appears, therefore, that the disposal discretion (except in Tasmania) may be fettered by an obligation to take direction where the decision has an element of policy and to the extent that the decision in a particular case is affected by that policy. It is far from clear what constitutes a governmental policy in a disposal case and to what extent (if any) the archivist's discretion could be made subject to lawful direction in pursuit of such a policy.

3.5 It is arguable that, in the Heiner case, the State Archivist could have legitimately taken into account the Government's reasons for seeking destruction of these particular records. These reasons were subsequently argued in very eloquent terms by the Queensland Attorney-General who said that "Cabinet acted properly and in good faith to rectify a very difficult situation for Mr Heiner, and the staff of the Centre who had provided information to Mr Heiner in confidence". He went on to say:

All reasonable steps were taken to ensure that the material could not be used detrimentally or otherwise regarding the future work prospects of all participants. This included Mr Coyne.

3.6 Whether these motives constitute a policy ground upon which the Government could properly direct the archivist in the exercise of discretion is open to argument. It appears, however, that the Cabinet Office (the agency which sought the approval) did not in fact seek to control the archivist's discretion by directing her in the avowed pursuit of any policy. In seeking advice from the Crown Solicitor on the wording of a letter to the State Archivist, the Cabinet Secretariat stated, inter alia:

Your advice is sought in regard to the letter's suitability especially in relation to the State Archivist not being seen to be pressured by the Government.

3.7 There is no documentary material in the Senate Report indicating what correspondence, discussions, or directions (if any) took place between the Archivist and her own departmental or ministerial superiors. Although the letter to the State Archivist from the Cabinet Secretariat sought "urgent" advice and referred to "questions ... raised concerning the possibility of legal action ... because of the potentially defamatory nature of the material", these doubts were given as the reason for terminating the Inquiry, not as grounds for seeking destruction of the records.

3.8 The request for approval to destroy fails, therefore, to indicate any "policy" by reference to which a legitimate direction could be given. It refers only to the Government's wish to maintain confidentiality (an implied argument that destruction is being sought as a means of controlling access) and asserts that the records are "no longer required or pertinent to the public record".

3.9 Approval for destruction was in fact given on the same day as the request was transmitted. As the Chief Officer of the QCJC's Complaints Section, Mr Barnes, said later: "To be frank, she must have known they were fairly hot documents when the Cabinet Secretary asked for urgent advice". We just do not know whether the State Archivist felt "pressured" in any other way on that day. It may be necessary to leave unanswered the questions raised by Senator Herron.

Senator Herron: " ... is it unusual ... I mean, is that normal practice, to your knowledge? My reading of that implication is that it is an extraordinary event. I mean, I have to say that, in all

my dealings with the Public Service throughout my life, I have never received an approval or a reply the same day ... "

3.10 The Senate Committee concluded:

"As the State Archivist followed the Government approach that it was inappropriate for officers of the executive government to provide any assistance to the Committee and declined to give evidence, the Committee is unable to determine whether her decision to approve the shredding might have been varied, had she been specifically informed that one potential litigant did in fact exist. Her decision was apparently made within a few hours of receiving the voluminous material on 23 February 1990, which suggests that her examination of it must have been cursory indeed. The shredding itself was not performed with undue haste: Cabinet approved the shredding on 5 March 1990; the shredding took place on 23 March 1990."

3.11 If the urgency in which the request was framed and the haste with which the approval was given are indicative of other reasons or of other transactions between the State Archivist and her departmental or ministerial superiors, they are not yet on the public record which shows, rightly or wrongly, that she reached an independent, uncontrolled, and unpressured decision on the merits of the case before her.

3.12 We should now turn to issues surrounding the nature of that decision and the reasons for it.

4.0 ISSUE THREE: Should Records be destroyed if they are required in evidence?

"Any person who, knowing that any book, document, or other thing of any kind, is or may be required in evidence in a judicial proceeding, wilfully destroys it or renders it illegible or undecipherable or incapable of identification, with the intent thereby to prevent it from being used in evidence, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years."
Queensland Criminal Code, section 129.

4.1 Much of the Senate Committee's time was taken up on the issue of "pending legal proceedings". It is clear that, once legal proceedings have commenced, it is a serious matter for one litigant to destroy documents which have been subpoenaed by the other party. When Crown Solicitor O'Shea advised in January 1990 on status of the Heiner Inquiry, he recommended (January 23) that the documents gathered by Heiner should be destroyed if it was decided to terminate the process, possibly believing them at that stage to be Heiner's private property. He noted, however:

"This advice is predicated on the fact that no legal action has been commenced which requires the production of those files."

4.2 There is no dispute that, when the Archivist's approval for destruction was subsequently sought, proceedings had not yet commenced and that no proceedings were begun before the records were eventually destroyed. It is also apparent that Coyne's wish to see the records and his intention to take legal action was known.

Senator Abetz: "Did that not alert you or the CJC that there was something of some importance to Mr Coyne there? Documents had been shredded, but the official advice to him that they had been shredded and the final advice received was two months after the event?"

Mr Barnes: "I do not see that the delay is either here or there. There is no doubt that the documents were destroyed at a time when cabinet well knew that Coyne wanted access to them. There is no doubt about that at all."

Senator Abetz: "Is there no doubt in your mind that cabinet knew that Coyne wanted the documents?"

Mr Barnes: "I am confident that is the case."

4.3 It has been argued in defence of the Queensland Government's actions that there was no legal obstacle to destruction and that the Queensland Government was within its rights in proceeding with the destruction. In a Ministerial Statement to Parliament, the Queensland Attorney-General objected to criticism that the records were subject to "pending" legal proceedings - arguing (rightly) that, since proceedings had not yet commenced, a distinction had to be drawn between legal proceedings which had been commenced or instituted and could thus be described as pending and those which were "intended", "foreshadowed" or "threatened". In the words of Crown Solicitor O'Shea:

"There is an abundance of authority to show that a civil action or proceeding is not pending until the originating proceeding (Writ, Summons or Motion) has been filed in the Court ... All the threats in the world to commence a Civil proceeding (or a Criminal one) do not make it pending, for the purposes of Section 129 of the Criminal Code."

4.4 In response to this, it has been argued that the O'Shea view is splitting hairs in anything other than a strict legal sense, that the Government should have behaved as a "model litigant" and, knowing that proceedings were contemplated (or "threatened"), it should have held its hand. In the words of one submission:

"The simple fact is that, by seeking to destroy these documents, the Crown has removed a prospective litigant of his rights. This cannot in any true sense of the word be in accordance with our democratic principles."

4.5 The distinction between destroying documents after legal proceedings are under way and destroying them to prevent legal proceedings being commenced was lost on some.

Senator Charmarette: "I am then saying that to me, from a lay point of view, to actually destroy the documents to prevent litigation being on foot seems very similar. Are you now saying that to actually use as your rationale for the destruction to prevent litigation being on foot is somehow different from litigation being on foot?"

Mr Barnes: "Yes. With respect, I say it is a lot different. What you do with your own property before litigation is commenced, I suggest, is quite different from what you do with it after it is commenced."

The curious thing here is that the Queensland Criminal Justice Commission (QCJC), an investigative body, appears to have found as a matter of fact that the Cabinet acted to destroy documents for the express purpose of preventing litigation.

Senator Abetz: "Does the CJC agree from its investigation that the documentation was shredded because there was fear that litigation might flow from that documentation if it were not destroyed?"

Mr Barnes: "The papers seem to suggest that both of the matters I have raised with you - the possibility of litigation and the concern that the people who had been induced to come forward to give evidence could be victimised - were foremost in the minds of the people who made the decision. But, with respect, I cannot look into their minds and see which of those issues was predominant."

Senator Abetz: "I am trying to get a handle on this. What seems to have occurred is that, with the potential threat of a defamation suit, Cabinet decided to shred the documents because they were of no historical value, knowing full well that it may be the material evidence on which a potential litigant would rely to pursue or prosecute his case."

Mr Barnes: "I think that probably is a fair summary. As a result of the actions, the correspondence and the communications, I think they believed that Coyne was considering suing the people who gave evidence before Heiner for defamation. As you say, the Crown Solicitor's advice seems quite clear that that was a potential and, consistent with that advice, cabinet decided that they would prevent that from happening."

A distinction can be made between cases where "what you do with your own property before litigation is commenced" is for some unspecified, probably unknowable purpose and the Heiner case where a competent investigative body has concluded that records were destroyed to prevent the litigation from commencing. Yet no one seems to have considered whether this conclusion by the QCJC about Cabinet's intent (if it could be sustained) would have altered matters.

4.6 The QCJC's contention was that Cabinet was acting in good faith on advice received from the Crown Solicitor though it, the QCJC, would not make an evaluation whether or not O'Shea's advice was good. The QCJC went on to argue:

"In our submission, there is not a scintilla of evidence to indicate that when the Queensland Government decided to shred the documents it had any reason to believe that it was acting unlawfully. It had cognisance of, and was acting in accordance with, legal advice provided to it by the Crown Solicitor.

"In those circumstances, there was no possibility of establishing that the members of the Cabinet had committed a criminal offence ... At this point the Commission had discharged its function."

It appears that ministers can commit no crime provided they act in good faith upon legal advice - regardless of the whether that advice is good or bad.

4.7 Counsel for Lindeberg, I. D. F. Callinan, Q.C., and R. D. Peterson, argued that the QCJC's interpretation was too narrow. They drew attention to a High Court decision in *R. v Rogerson and Ors* (1992) 66 ALJR 500:

... it is enough that an act has a tendency to deflect or frustrate a prosecution or disciplinary proceedings before a judicial tribunal which the accused contemplates may possibly be implemented ... Mason CJ at p.502.

A conspiracy to pervert the course of justice may be entered into though no proceedings before a court or before any other competent judicial authority are pending ... Brennan and Toohey JJ at p.503.

4.8 The U.S. courts take an equally strong line in condemning the destruction of records as an "obstruction of justice" and the whole issue appears to have received greater consideration there than in Australian courts. The question was reviewed at some length in *The Notre Dame Lawyer* in 1980:

Whether a company has an ad hoc search and destroy operation or a regular records retention program, management and counsel must consider a federal criminal statutory scheme which renders the destruction of documents illegal if it interferes with judicial, administrative or legislative investigations or proceedings ... If a party to a civil proceeding has destroyed records, a negative inference may be drawn from that fact and exploited for its prejudicial value at trial.

4.9 Federal statutes in the U.S. restrain destruction of documents (or any evidence) in judicial proceedings and American courts also have had to consider at what stage in proceedings a criminal liability arises:

... the courts ... have concluded that only ongoing or pending judicial proceedings ... fall within the section's ... language ... The courts reason that a person unaware of the pendency of a proceeding could not have the requisite intent to obstruct justice ... The courts justify their literal interpretation ... with the maxim that criminal statutes should be strictly construed.

Although the substantive offense of obstruction of justice requires a pending proceeding, otherwise punishable conduct which precedes pendency is not immune from prosecution. In *United States v. Perlstein* the Third Circuit affirmed convictions for conspiracy to obstruct justice even though the conspirators were not found guilty of the substantive crime ... The court stated : "... there is nothing to prevent a conspiracy to obstruct the due administration of

justice in a proceeding which becomes pending in the future from being cognizable under section 37 [antecedent of present conspiracy statute, 18 USC #371].

4.10 The same principle is applied even more widely to obstruction of proceedings undertaken by departments, agencies, and committees:

Courts have expressed various views as to the time at which an agency's activity first qualifies as a "proceeding" ... when the agency is notified of potential violations; when pre-investigation begins; when an informal inquiry begins; or when a formal order is issued directing investigation to begin ... As one court explained : "[T]he growth and expansion of agency activities have resulted in a meaning being given to "proceeding" which is much more inclusive and which no longer limits itself to formal activities in a court of law. Rather, the investigation or search for the true facts ... is not ruled as a non-proceeding simply because it is preliminary to indictment and trial".

4.11 The question whether an Australian court would follow American precedent and entertain charges of conspiracy with regard to "punishable conduct which precedes pendency" does not appear to have been discussed. It is apparent from all of this that the legal issue is far from clear. It is at least arguable that the view taken by the Queensland Crown Solicitor and the QCJC (in effect, that no issue of obstruction arises until proceedings have actually commenced regardless of circumstances or intent) is too narrow. Insofar as this is a question of criminal liability, archivists and records managers can only try to stay in touch with unfolding developments in the courts and endeavour to ensure that their conduct does not implicate them wittingly in a conspiracy to obstruct justice or unwittingly in smoothing the path of others so bent.

4.12 The exercise of the archivist's discretion, however, involves issues which go beyond questions of criminal liability. The QCJC argued that its jurisdiction was limited to a consideration of "official misconduct" and that

conduct will not amount to official misconduct unless it constitutes a criminal offence or a disciplinary breach that provides reasonable grounds for termination of [a] person's services.

In the case of ministers (who are not subject to a disciplinary regime), conduct must amount to a criminal offence - cf. the "Greiner defence". Archivists, like anybody else, must avoid crime. The question we must now consider is what their role and responsibility is beyond that. The Queensland defence against official misconduct amounts to this: if they can't put you in gaol for it or sack you for it, it isn't corrupt. The professional concern goes to the further issue: whether or not the State Archivist was or should have been apprised of the wish of potential litigants to have the records and what weight, if any, that knowledge should have been given when deciding whether or not to approve the request for destruction.

4.13 There is no suggestion that a failure to consider the interests of potential litigants is misconduct in the technical sense. Indeed, one reason for giving the above lengthy account of one of the legal issues to which the Heiner case gives rise is to suggest the impossibility of reducing the Archivist's responsibility to a case by case adjudication of such matters. The above account distils lengthy, convoluted, and confusing argument before the Senate Committee gathered over many months. It eliminates many claims and counter-claims advanced during the hearing of evidence. Learned lawyers expended much breath and ink first establishing and then arguing differing interpretations of the facts.

4.14 If eminent lawyers and investigators with all of the benefits of hindsight and the leisure to consider matters from every angle cannot reach agreement, it is simply preposterous to say that the Archivist, confronted with the necessity of reaching a decision in circumstances similar to those in which Lee McGregor found herself on or about February 23, 1990, could have done so. That is not the nature of the Archivist's discretion. It will be seen, therefore, that whether or

not the Archivist is required to consider or to be apprised of the wishes of potential litigants in a particular case (see 6.0 below) is not central. We may even agree with Barnes that establishing whether potential litigants have legally enforceable rights to records proposed for destruction has "nothing to do with the archivist".

4.15 It is not the job of the Archivist to adjudicate disputed rights or to second guess the courts on a particular case. The Archivist cannot be expected to evaluate the potential probative value or status as evidence of this or that folder of documents which she is asked to examine. No more can she be expected to evaluate the potential historical value of folders of records placed in front of her. The whole process of calling upon the Archivist for an opinion about the value of a heap of records, whether for history, litigation, or any other purpose, is deeply flawed. Such one-off evaluations may need to be carried out occasionally and for exceptional reasons, but they do not and should not be allowed to be represented as the "norm" for archival appraisal.

4.16 The Archivist's job is to identify categories of records, not examine piles of them; to analyse administrative processes not investigate particular instances; to consider the reasons, pro and con, why records should be kept and for how long, and to establish a regime to ensure that records are kept for as long as necessary and for no longer. Ministers and officials need to be told that they cannot expect to come to the Archivist as Tait did and to get one-off approval to destroy a particular set of records except in the most extraordinary circumstances which they will be called upon to explain and justify. If, despite all this, an archives chooses to establish one-off evaluation as the norm, then it does indeed impose upon itself the obligation to investigate the circumstances of each particular case.

4.17 Common sense indicates how the Archivist's discretion must be exercised : "there needs to be some regulation on the period of time that certain records must be kept ..." (see para 6.18 below). It is the Archivist's job to determine and enforce those periods and to establish a disposal regime in which they are routinely applied without reference back to the Archivist in every instance. It is in determining what the period must be that the Archivist must be concerned with all of the purposes for which records belonging to each category may be needed - including the interests of potential litigants. We will now examine why this is so.

5.0 ISSUE FOUR: Should the Archives disallow destruction in the interests of potential litigants?

"These [records of legal value] are records which involve long and short term rights of the council or of private citizens and which are enforceable by the courts, e.g.: contracts, tender documents, building approval permits, leases, title deeds, etc. ... In general, the record should be retained long enough to ensure that the rights of the council and of any individual concerned are fully protected."

QSA: General ... Disposal Schedule for Local Government Records in Queensland.

5.1 There appears to be agreement that the Archivist was not informed that the records had been sought or that legal action was contemplated. So far so good. From this point on, things are less clear. A variety of reasons has been suggested for Cabinet's wish to have the records destroyed. Michael Barnes, for the QCJC, suggested:

"It is clear that Cabinet made the decision to destroy the documents knowing full well that Coyne wished access to them. It may be that Cabinet made that decision to destroy the documents on the basis that, in its view, the public interest in protecting the people who gave evidence before Heiner outweighed Coyne's private interest in having access to them."

5.2 The Senate Committee found that a "more pragmatic" explanation could be inferred from Crown Solicitor O'Shea's advice of January 23, 1990:

"Naturally Mr Heiner is concerned about any risk of legal action which may be instituted against him for his part in the inquiry and it would appear appropriate for Cabinet to be approached for an indication that should any proceedings be commenced against Mr Heiner because of his involvement in this inquiry, the government will stand behind him in relation to his legal costs and also in the unlikely event of any order for damages against him."

The Committee then concluded that:

"The most plausible explanation for the shredding of the documents was to protect the public purse from the expenses of litigation. If in so doing, the rights of an individual (Mr Coyne) were negated, as he and others assert, some would argue that they were sacrificed for a reason."

5.3 It will be seen that all these speculations involve, in some degree or another, a balancing of the reasons for destruction against the reasons for retention. All of them are expressed as things which might have been in the mind of Cabinet members when they came to consider whether or not the records should be destroyed. It is the contention of the QCJC and the Crown Solicitor that the responsibility for making this decision (for balancing the reasons for and against destruction) lay with the Queensland Government, not with the Archivist (who, according to the QCJC, was limited to a consideration of historical value). It is the contention of their critics that the Queensland State Archivist's role is not limited to questions of historical value and that she too had a responsibility to weigh all relevant considerations in reaching her decision.

5.4 On the most altruistic representation of the case, that given by the Attorney-General in explanation of his own and his colleagues' actions, the Queensland Cabinet was acting as an honest broker between the contending parties, reaching a difficult decision in the best interests of all concerned. Cabinet was impartial, reasonable, and acting in good faith. A difficult balance had to be struck between competing interests, but Cabinet could be trusted as an appropriate arbiter.

5.5 On any other view, Cabinet was an interested party - not standing above the fray but directly involved. No fair evaluation of the competing claims could be found there. It may be that, on the balance of considerations, destruction of the records was "reasonable" but the Queensland Cabinet was no fit body to decide that because it had reasons of its own for preferring one outcome over another.

5.6 The Queensland Government wanted to protect its interests in threatened legal proceedings. This is a perfectly legitimate aspiration but it cannot then be suggested that the Government itself had no interest in the outcome of the disposal decision. Its interests as a potentially litigating party (or, more strictly, as liable for costs of damages awarded against potentially litigating parties) were bound up in the outcome of the disposal decision:

"... there will be no report. Thus, the risk of staff being exposed to legal action is reduced.

"I want to remind you all, however, of the current Government policy regarding the legal liability of Crown employees - which you all are.

"In short, the Crown will accept full responsibility for all claims arising out of a Crown employee's due performance of his/her duties provided these duties have been carried out conscientiously and diligently."

Cabinet could not plausibly assume legal liability in the matter and impartially weigh the rights and interest in preservation of its adversaries in the threatened litigation. In destroying the records, Cabinet usurped the role of the court (the only body which could have impartially determined the issues between the contending parties) by pre-empting the possibility of legal action by the Government's adversaries to resolve the matter there.

5.7 There is nothing wrong with governments seeking to protect their own interests. But governments are also charged with protecting the interests of individual citizens and the two sets of interests may be in conflict. When the Queensland Government pre-empted court action by destroying documents it was acting in its own interests. It cannot then turn around and claim to be acting in everyone's best interest. Only an independent arbiter can do that and in determining whether official records should be destroyed, that is the role of an independent State Archivist.

5.8 In these circumstances, the only way in which a truly fair and equitable outcome could have been reached (which might well have been that, on the balance of interests involved, the records should have been destroyed) would have been for the matter to have been judged by a truly independent authority, with no interest in the outcome, which could be trusted to fairly evaluate and (where necessary) protect the citizen's rights and entitlements against the concern of Government to defend itself against potential legal action.

5.9 This kind of reasoning has long been advanced as the rationale for an independent archives authority capable of evaluating disposal action by balancing, amongst other things, the competing interests of Government and its citizens in the destruction/preservation of records. It was used by the U.S. District Court in 1980 when issuing an injunction to prevent the National Archives and Records Service of the United States (NARS) and the Federal Bureau of Investigation from proceeding with a scheduled destruction of records sought under Freedom of Information (or potentially subject to FOI requests). The court allowed the injunction in part on the argument that NARS had not taken sufficient account of the rights of members of the public, including persons claiming to have suffered legal wrongs. The court ruled:

It is thus clear that the Archivist never discharged his statutory responsibility to make independent judgements concerning the record retention and destruction practices of the Federal Bureau of Investigation. This neglect, without more, fatally flaws the legality of any further destruction of records by the FBI ...

... Congress has determined that federal record-keeping shall accommodate not only the operational and administrative needs of the particular agencies but also the right of the people of this nation to know what their government has been doing. The thrust of the laws Congress has enacted is that governmental records belong to the American people and should be accessible to them ... The thrust of the actions of the FBI, perhaps naturally so, has been to preserve what is necessary or useful for its operations. The Archives, which should have safeguarded the interests of both the FBI and the public, in practice considered only the former.

5.10 Of even more significance, of course, is the importance of an independent archives authority in preventing the untoward destruction of evidence of government corruption and wrong-doing and in establishing a regime of records management which supports the public interest in government accountability. A government whose right to destroy records is limited only by an independent evaluation of their historical value can remove at will all evidence of corruption and wrong-doing and thereby effectively frustrate the fight against corruption.

5.11 The Crown Solicitor's justification for the Queensland Government's action gradually narrows down to an analogy between Government and any other private litigant:

In a free society, a person (and this includes the Crown) does not need to find an enabling law to enable that person to destroy his or her own property. In a free society a person (which, as I said, includes the Crown) may do what he likes with his property, including destroying it, unless there is some positive law preventing its destruction.

Had the Heiner documents been the property of Mr Heiner, and not the Crown's, he could have destroyed them without the Chief Archivist's permission but, because we ultimately came to the conclusion that the property in them was in the Crown, the Chief Archivist's

permission was necessary and, in my opinion, she was quite entitled in the circumstances to grant that permission.

There is no suggestion here that Queensland's public records belong to the people. According to Crown Solicitor O'Shea, Queensland's public records belong to the Government and the Government has no obligation or responsibility to its citizens which is not analogous to that of any other "person" in a free society (except to submit proposed destructions to the Archivist for approval).

5.12 The Government is not just any other private litigant. The State has a responsibility to safeguard citizen's rights and entitlements. Parliament has established a system of checks and balances, amongst which the requirement for the Queensland Government to submit its intention to destroy public records for independent assessment by the State Archivist may be included. Where a conflict (or potential conflict) may be found between the executive's actions and the citizen's interests, the latter must be protected by the intervention of an independent authority, free from potential control by the executive, whose job it is (in part) to look out for the citizen and, in the final analysis, to weigh competing interests in retention/destruction. That is why, in matters relating to disposal of public records, it is the Archivist and not the executive or any of its arms who must decide.

5.13 It appears, however, that the State Archivist of Queensland was never placed in possession of the facts which would have enabled her to make such an evaluation. We must now examine why this was so.

6.0 ISSUE FIVE: What is the purpose of the Archives' Discretion?

6.1 It is a common, but flawed, view that archives are the permanent records selected for historical purposes and that government archivists are concerned with the management of records only to the extent of determining which of them should be preserved as "historical records". On this view of its responsibilities, the archives authority should confine its evaluation of requests for approval to destroy records solely to the issue of whether the records in question should survive for historical research purposes.

6.2 Is any such limitation of purpose to be found in our archives laws? One has to consider the stated purpose of the archives law and the specific provisions relating to disposal. In the Queensland legislation (*Libraries and Archives Act, 1988*), the Archives (QSA) are established, inter alia:

50. ...

... to promote the making and preservation of the public records of Queensland, to exercise control over their retention and disposal, to provide facilities for their storage and use ...

Public authorities in Queensland are required, inter alia, to:

52. ...

(a) Cause complete and accurate records of the activities of the public authority to be made and preserved;

(b) Take all reasonable steps to implement recommendations of the State Archivist applicable to the public authority concerning the making and preservation of public records.

Disposal is regulated by decision of QSA:

55. ...

(1) A person shall not dispose of public records other than by depositing them with the Queensland State Archives -

(a) unless -

(i) the State Archivist has authorized the disposal ...

6.3 It is argued by some that regulatory powers such as these should be "read down" because their only object is to ensure the deposit in the archives of records wanted for historical research purposes. It is said that the regulatory powers are conferred to ensure historical records get into the archives and for no other purpose. The archives is not (and should not be) empowered to regulate records management in any way which implies a wider responsibility or a concern with any other purposes for which records might be kept. Government agencies are required to keep "full and accurate records" for no other reason than ensuring that a good historical record can subsequently be extracted therefrom.

6.4 This is exactly the line of argument used by the QCJC to defend itself from allegations that it failed to reach an adverse finding on the circumstances surrounding the destruction of the Heiner documents:

Mr Barnes: "... we have to look at the archivist, because Mr Lindeberg is concerned that her actions in authorising the destruction were inappropriate ... The Archivist's duty is to preserve public records which may be of historical public interest; her duty is not to preserve documents which other people may want to access for some personal or private reason. She has a duty to protect documents that will reflect the history of the State.

"... In my submission, the fact that people may have been wanting to see these documents - and there is no doubt the Government knew that Coyne wanted to see the documents - does not bear on the Archivist's decision about whether these are documents that the public should have a right to access forevermore ... That is the nature of the discretion she exercises. The question about whether people have a right to access these documents is properly to be determined between the department, the owner of the document and the people who say they have got that right. That is nothing to do with the Archivist, so I suggest to you that the fact that was not conveyed to the Archivist is neither here nor there. That has no bearing on the exercise of her discretion."

It follows from the QCJC view that when agreeing to or refusing an agency's request to destroy records QSA should not concern itself with any use the records might have - save for historical research. It is not the archives' responsibility, they say, to consider any other uses or any other requirements to preserve records. This latter responsibility rests exclusively on the department concerned, and the exercise of an independent responsibility by the archives is both unnecessary and detrimental.

6.5 Accountability through records management ultimately involves a concern with what records are created. This has been recognised in Victoria, Queensland and Western Australia. In Victoria and Queensland, the archives law imposes on agencies a statutory obligation to create and maintain "full" or "complete" and "accurate" records. In Western Australia, the obligation is to maintain a system of records management with the advice and assistance of the archives which is required to offer advice and assistance, inter alia, on the creation of records. These duties are quite separate from the obligation to submit to archives regulation before destroying any record.

6.6 In some cases (e.g. NSW), it is true that the archives are not called in until an agency decides it wishes to dispose of its records. The archives then has the final say. This is the clearest case where it might be argued that the intention is that the only consideration relevant for the archives is whether (in its view) the records should be preserved for historical research.

6.7 Although the NSW Act does not give the archives explicit responsibility for appraising records on public interest or accountability grounds, it does not explicitly limit the archives to historical research grounds either in determining whether to agree to destruction. Since there is (neither in NSW nor in any other Australian jurisdiction) any other general statutory regulation of disposal or any statutory requirement on public sector managers to have regard for accountability and other public interest purposes in determining whether or not to keep records, it is legitimate to ask whether it was the intention of the legislatures when passing archives laws

that the archives should have regard solely to consideration of historical research values. To put the matter more bluntly, on what words in the Queensland Act does QCJC base its argument that QSA should ignore :

- Any other reason it may perceive for keeping records even though they have no value for historical research,
- Any public interest (other than the need for an historical record) bearing adversely on the agency's wishes to destroy the records, or
- "The fact that people may have been wanting to see" the records, when considering whether to agree or withhold consent to an agency's request for approval to destroy records?

6.8 It may be arguable that as matters stand in N.S.W., South Australia, and Tasmania (all of which give their archives power to veto destruction decisions and to take custody when they do but no explicit role in records management), it was intended the archives should concern itself primarily with preservation for historical purposes.

6.9 The view of the archivist's role adopted by the QCJC is not tenable in the case of the Commonwealth, Victoria, Queensland, or Western Australia (all of which provide for the involvement by the archives in records management). The wider view of the Archives' role in those cases is strengthened by the fact that in the three States mentioned the legislatures have taken the logically necessary step of requiring agencies to "make" full and accurate records in the archives law.

6.10 An alternative view of the Archivist's responsibilities in narrow legal terms was developed by the Queensland Crown Solicitor who asked only what actions of the State Archivist are expressly permitted or prohibited? This view fails to evaluate the propriety of the manner in which the Archivist's discretion is exercised - whether it is done fairly and justly.

6.11 They are not the same thing. The test for propriety is broader than the test of legality. It is possible to act within the black letter of the law and still behave unfairly or unjustly. It is possible to argue that fairness and justice required the Archivist to consider whether or not the records were needed to satisfy the rights and entitlements (or merely the wishes and curiosity) of an individual citizen, that the Queensland Government was derelict in failing to supply her with relevant information on that issue, and that the Archivist should have taken steps to satisfy herself on this point before approving the destruction.

6.12 No one has disputed that the destruction occurred despite an expressed wish by a citizen to gain access to the records to support possible legal action. Indeed, it seems pretty much conceded that this was the reason for the destruction. Instead, it has been argued by the QCJC that these matters are irrelevant to the Archivist's decision whether or not to destroy records and that the sole role of the Queensland State Archives is to reach a decision on the value of the records as "historical" without reference to any other matter which might be relevant to retention/destruction.

6.13 If the QCJC's view goes unchallenged, it helps to lower the benchmark for archival responsibility. If that is allowed to happen, government archivists had better watch out. Aggrieved whistleblowers come from behind. All the forces of established interests are ranged against them. But they keep coming and each case prepares the ground better for the next one. Next time someone is aggrieved in a disposal case the issues will be better defined because of what has happened in the Heiner Case.

6.14 The Heiner Case helps define the issues for the next person who is aggrieved by destruction of public records which denies them the opportunity to take their case further. Sooner or later someone in that position is going to make the connection between the wrong

they feel when the records needed to make their case are denied them and the compliant archivist who made that possible. When that day comes, archivists better have answers on where their responsibility lies.

6.15 In those circumstances, it is unlikely that the Queensland defence will avail them much. It rests on two mutually inconsistent planks:

- The narrow legal arguments of Crown Solicitor O'Shea that:
 - ▶ There was no objection to destruction absent legal proceedings which had actually been instituted or "some positive law preventing" it,
 - ▶ the government clearly had the right to destroy "its own property" in accordance "with a Statutory regime which permitted its destruction", and
 - ▶ the Archivist had a "wide discretion ... to authorize destruction" and was "clearly within her rights" in so authorizing it on this occasion; and
- The policy argument launched by the QCJC representative Barnes that the Archivist's discretion is limited to questions "of historical public interest" and that other reasons which might exist for retaining records have "nothing to do with the archivist".

6.16 Taken separately, either of these arguments might be sustainable (though the O'Shea view is clearly unhelpful in determining what factors the Archivist must consider). Taken together, they make a nonsense. On the one hand, destruction is a matter for the Archivist alone and she has a wide discretion in the exercise of which she is not obliged to consider any matter pertaining to citizens' rights or interests because there is no express legal or statutory obligation for her to do so. On the other hand, the Archivist is precluded from giving consideration to citizens' rights or interests because such consideration is outside the area of her discretion despite the fact that there is no express legal or statutory restriction preventing it.

6.17 In the absence of statutory appraisal criteria and with no case law to speak of, the scope of the Archivist's responsibilities cannot be found simply by looking for express legal or statutory obligations. The attempt to find it there reached its *reductio ad absurdum* in subsequent correspondence between the State Archivist and the Queensland Justices' and Community Legal Officers Association (QJA) :

QJA to State Archivist, May 19, 1995.

- (c) Is there any legal/legislative provision governing or directing the provision of advice/information relevant to enabling the State Archivist to satisfy criteria for decisions to retain or dispose of public documents?
- (d) Are you aware of any legal/legislative provision which requires that the State Archivist is to/must be alerted to any existing or potential legal demand for access to or retention of public documents?

State Archivist to QJA, May 31, 1995.

- (c) I am not aware of any legal/legislative provision governing or directing the provision of advice/information relevant to enabling the State Archivist to satisfy criteria for decisions to retain or dispose of public records;
- (d) I am not aware of any legal/legislative provision which requires that the State Archivist is to/must be alerted to any existing or potential legal demand for access to or retention of public records.

Quite so, but by the same token there can be no "legal/legislative provision" which prevents the Archivist from considering relevant matters (the alternative is for her to decide by mere whim) or from at least asking for relevant information - even if there is no obligation to provide it. You can't have it both ways. The true nature of the Archivist's responsibilities cannot be established within such narrow limits.

6.18 The bewilderment of non-professionals when our archives laws fail them instinctively seeks for redress in a wider view of recordkeeping responsibilities. This was apparent in

testimony given before the Senate Committee in another (unrelated) matter involving "missing documents" sought under FOI.

Senator Abetz: "As a matter of principle you talk about the disappearing of documents, and previously we have heard what the criminal code here requires when legal proceedings are underfoot and whether you are allowed to destroy documents. From your experience, do you believe that the current law is sufficient or do you think it ought to be extended to make it an offence to destroy documents which a person must reasonably believe capable of being used in proceedings sometime in the future?"

Mr Jesser: "I am not even sure whether it is as specific as that. An organisation must keep archival records for some period - so that it can conduct an investigation or just as normal correspondence, it must surely keep back-up discs for 12 months or two years or something like that. It seems to me to be slightly unreasonable to say, 'We don't keep any back-ups' or 'We don't know what happened last week in our correspondence. It has all disappeared.' I think that there needs to be some regulation on the period of time that certain records must be kept ..."

Of course an organisation must keep archival records for some period "so that it can conduct ... normal correspondence". Of course, "certain records must be kept". The basic human need for records could be put more expertly but hardly more eloquently. It is the very basis of the recordkeeper's mission, our reason for being, the most fundamental thing about us. It is not, however, in legal opinions or through statutory provisions alone that this need will be satisfied. We know that it must be satisfied by establishing a reliable and trustworthy recordkeeping regime and through the integrity and diligence of recordkeepers. If we fail this trust, however, and allow the public perception of our mission to be reduced to "legal/legislative provision" because we have not articulated and re-affirmed the nature of our professional responsibilities at every opportunity or (what is worse) allow others like the Queensland CJC to misrepresent our mission unchallenged, then we can blame no one but ourselves when the public is ignorant of or loses faith in our role.

6.19 The practice of archivists in Queensland and elsewhere, though not founded on express "legal/legislative" provisions is described in the remainder of QSA's reply to QJA dealing with criteria applied and sources of information used :

The attached leaflet detailing the appraisal process sets out the general criteria for retention of public records [including consideration of "details which may serve to protect the civil, legal, property or other rights of individuals or the community at large"].

The main source of information relied on is contact with the agency whose records are being assessed, and where necessary, with other Government agencies. this would be supplemented by published documentation as appropriate. archives staff also tend to build up a good working knowledge of the functions and operations of government agencies.

6.20 If the Archivist asks for relevant information and it is not provided, she can refuse to agree to destruction. If false information is provided, then the responsibility for thwarting her attempt to inform herself of relevant considerations is placed clearly where it belongs - on the agency which trades in untruth - and the propriety of the agency's action can be judged by appropriate authority (e.g. the CJC or the Ombudsman). If the Archivist doesn't even try to find out what needs the records may serve before she agrees to their destruction, the question becomes whether this manner of exercising the discretion is proper - regardless of any strict obligations which may or may not be imposed by legal/legislative provisions.

6.21 Is there anything else the prudent archives authority can do to ensure that (in the absence of strict "legal/legislative provision") citizens' interests in records retention are protected? Two measures, at least, suggest themselves.

7.0. ISSUE SIX : What can the Archives do to prevent destruction adverse to Citizens' Interests

7.1 The point was several times made that the Government did not advise QSA of the possibility of litigation and that it would be unreasonable to expect QSA to be able to find out in such cases whether proceedings were in prospect. It is clear that no archives can expect to be aware of all potential uses for records relating to a particular matter. Indeed, it has been argued above that consideration on a case-by-case basis is both an inefficient and an unsatisfactory method of discharging the Archivist's discretion (see section 4.0).

7.2 There are steps which may be taken by the prudent archivist to limit the ill-effects of the absence of "legal/legislative provision" requiring or enabling the archives to inquire more closely into the circumstances of each case.

7.3 One way is for archivists to refuse to grant approval for destruction relating to a particular matter in any circumstances (or only in exceptional circumstances, where the agency makes a special case). The archivist could establish routine procedures governing the timing and processes for disposing of records belonging to different categories of records and then treat with suspicion any request to destroy records concerning a particular instance outside of these normal procedures.

7.4 On this basis, QSA's response to cabinet's request would have been "no, we have determined that records of inquiries such as this are to be destroyed x years after the termination of the inquiry and we see no reason to depart from normal practice in this case". Cabinet would then have been obliged to postpone the proposed action and deal with the records in a routine rather than an extraordinary way or else explain to the Archivist the reasons it was in haste to get rid of them.

7.5 In reaching its decision on the disposal of inquiry records (in advance of any request for approval on a specific instance), QSA would have already considered the balance of possible uses to which records of this type might be put and have come to an evaluation of the competing interests (including the entitlements of citizens wanting to subpoena records in legal action against the government) - on general terms and not in relation to any particular case before government at the time a request for approval was received. Such generalised rules of administrative action - though they could not be guaranteed to work to the citizen's advantage in all cases - would at least establish a minimum standard of routine conduct in which victimisation would be more difficult.

7.6 Another way is for archivists to place a caveat on all destruction approvals voiding the permission in specified circumstances. Thus, both the Victorian Public Record Office and the Australian Archives operate under a general instruction to departments which makes void any destruction approval where a freedom of information request has been lodged. It would be possible (and, in the light of the Heiner case, arguably desirable) for government archives to issue generalised instructions making explicit the position of records due for destruction where the agency has been made aware of a citizen's intention to take action to obtain access. It is unlikely that an indefinite postponement of destruction could be made in such cases, and it might indeed be determined that no postponement of any kind should be mandated. But at least a policy would exist, a standard would have been established, a bench-mark would be provided to test the propriety of agencies' actions in particular instances, there would be evidence that the matter had been considered and citizens aggrieved by the outcome in a particular case could be assured they had not been singled out and know why they were unable to get any further.

7.7 The point is that such questions do come within the scope of an evaluation of what is a proper, responsible, and fair exercise of the archivist's discretion and they should be

considered by the archives authority (in rejection of the QCJC's submission that they are none of the archivist's business) not merely ignored.

8.0 ISSUE SEVEN : Should the Archives be limited to questions of "Historical Value"?

8.1 Consideration was given above (6.0) to the validity in law of the CJC's contention that the Archivist was limited to "historical" factors in the exercise of her discretion. It is now necessary to consider the policy implications. The QCJC's position can be bolstered by arguing that:

- Regulation of records management is adequately provided for by other means - the involvement of the archives authority is unnecessary because it adds nothing to existing safeguards;
- External regulation for any purpose other than the identification of an historical record impinges on the proper role and responsibility of record creators - the involvement of the archives authority is detrimental because it detracts from and interferes with the work of administration.

8.2 In response to the first of these assertions, it is clear that the role of the archives authority is not exclusive. The regulation of disposal by the archives is not intended to relieve the chief administrator of any obligations and responsibilities which he has, arising from any other obligation. The archives' regulatory role does not (as argued) derogate from, or in any way substitute for, other mechanisms of control and accountability - either existing or which may be created in future.

8.3 The Archives has, in effect, a veto over an agency's decision to destroy records - it cannot compel destruction. Likewise, approval from the Archives cannot (of itself) relieve an agency of its responsibilities in respect of other mechanisms.

8.4 What then is the "value added" by the Archives? Clearly, it lies in the requirement that agencies submit their records practices to external scrutiny. When it comes to the maintenance and destruction of documents, agencies (and their chief administrators) may be in a situation of conflict of interest or subject to political pressures.

8.5 The requirement to formally submit their records practices and disposal decisions to external scrutiny :

- Provides additional safeguard for the public interest in records retention (to ensure that governments cannot "cover up" and a safeguard too for individual citizens in conflict with government);
- Establishes routine procedures for documenting the decisions taken (through archives' disposal schedules and destruction authorities) so that if any question of what was authorised later arises it can be settled by reference to those records; and
- It should be pointed out, it provides the public servants who are records creators with some measure of protection from undue political interference in the process of keeping and destroying "full and accurate" records.

8.6 No Minister or official determined to destroy or falsify the record will be prevented by archives law from doing so. What archives procedures do is to establish a norm, a routine procedure, from which such actions can and usually will be seen to depart, thus making detection more likely. Brian Bourke, it was alleged, was personally supervising the "stripping" of files in his department until someone pointed out that this was not correct procedure. It is the purpose of archives laws to establish and police such routine procedures so that departures from them (which can't always be prevented) will at least be obvious and will be seen to be outside acceptable limits.

8.7 This is the response, incidentally, to those who argue the futility of archives regulation which has never been enforced through prosecution and fine or imprisonment in this country. The value of the archives regime is that it establishes a bench-mark (a test) by which good and bad behaviour can be measured and it creates an environment in which departures from the bench-mark are more likely to be found out. Just as financial auditing has been effectively applied to both public and private enterprise, so to can archival regulation be applied - if there is the will to do it. Statutory provision simply provides its basis and authority for doing so.

8.8 Is the regulatory role detrimental to efficient administration? Certainly, the archives procedures overlay administration with "additional" requirements, but do they add to the "burden" on chief administrators? Good archives and records management practices are, after all, meant to assist and foster efficient administration, not to weigh it down with unnecessary burdens. How, it might reasonably be asked, is the regulation of disposal for the purposes of accountability any more of an interference in "efficient management" than regulation of disposal for research purposes?

8.9 Nor can it be argued that the additional safeguards proposed here (7.0 above) represent an increased workload on top of current practice. Quite the contrary. Nothing could be more wasteful of resources than the cumbersome case by case appraisal which routinely passes for archival evaluation. If attention were paid instead to developing and implementing disposal policies and establishing recordkeeping regimes which focussed on documentation of government activity (of which disposal is merely an expression) rather than evaluation of files and folders when requested to do so, it would be a much better use of available resources. Needless to say, under such a regime cases like this would not arise because the opportunity to destroy the Heiner documents as a one-off, outside of routine procedure, would simply not have been available. Think of that - all the money that could have been saved if Cabinet need not have met about it, the Crown Solicitor need not have deliberated about it, and the QCJC need not have investigated it or subsequently defended its actions.

8.10 Is it, in any case, suggested that accountability requirements should be subordinate to efficiency? What tenable view of public sector efficiency could be based on a refusal to acknowledge and serve the public interest in accountable administration? For such arguments to be sustained, the alleged "inefficiencies" and costs of accountability itself would have to be demonstrated, not merely assumed.

8.11 Should record creators be the sole judges of the public interest in preserving their records? Clearly not, since all mechanisms of accountability provide some kind of external and independent judgement as to what constitutes public interest and in the balance, where necessary, of individual rights and entitlements with public interest represented by governmental policy. These judgements necessarily cut across the responsibility which a government agency has for efficient management.

8.12 The better view is that departments and agencies must be responsible for efficient administration subject to compliance with the rules and regulations established by or in accordance with the law to serve the needs of government, the public interest, and the individual citizen. If this "infringes" on administrative independence, archives law must similarly infringe because archives laws are concerned with the survival of full and accurate records upon which such accountability mechanisms depend for their effectiveness.

8.13 No government or private organisation concerned with its own operational efficiency and ultimate survival (let alone any concern for the public interest) could acknowledge such "independence" from accountability. History (and in this country, very recent history too) tells us that inefficiency, corruption, and mismanagement thrive in the dark, not under the spotlight.

8.14 The Queensland Electoral and Administrative Review Commission found that its investigation of alleged irregularities in electoral redistribution was thwarted by the lack of an adequate public record. It concluded that the State's archives system had to be upgraded and strengthened. Can anyone suppose, as the QCJC would apparently have us believe, that the EARC's concern was for the lack of an adequate historical record?

8.15 The Western Australian Royal Commission into the W.A. Inc. scandals concluded that its investigations were hampered by gaps in the official record. It recommended that the Western Australian archives system should be upgraded and strengthened. It is nonsense to suggest, as the QCJC must contend, that the Royal Commission was worried solely about the impact on scholars.

8.16 There must be external regulation of records management in the service of accountability. The obligation to create full and accurate records, manage them properly, and keep them for purposes other than those of the agency which produced them own has to be provided for. Where is it provided for apart from the archives laws?

8.17 No Australian court case has tested the question : to what considerations (or purposes) should the archives have regard in deciding whether or not to consent to an agency's request for approval of destruction? It has, however, been established practice here and elsewhere for archives to regulate disposal on the grounds of public purposes justifying retention beyond the wishes of the agency concerned. Thus, in Victoria, the Public Record Office routinely requires agencies to retain records longer than they wish where an FOI interest is established or deemed likely. All Victorian destruction authorities and schedules carry a caveat voiding the destruction authority for any documents subject to an FOI request until the request is granted or all appeals are exhausted.

8.18 Whether the archives has a broad or narrow role comes down to this :

Can an archives authority having general power to approve or disallow applications by government agencies to destroy public records limit its consideration of the matters upon which it must satisfy itself before granting its consent to a consideration of historical research purposes only in the absence of the clearest indication from the legislature that this is what was intended?

No archives should feel justified, when exercising its power to approve or forbid the destruction of public records, in wholly disregarding all other considerations apart from the needs of historical research.

8.19 Archives laws provide the only general statutory regulation of which records are kept and which destroyed. Other mechanisms such as FOI, the Ombudsman, the courts, inquiries, reviews are all limited and circumscribed in their effect by what records do in fact exist when they are brought into deal with a particular instance. They very often have to be invoked by an interested party. They are not in a position usually to intervene before the fact. No prior decision to destroy relevant records can be overturned or ameliorated by the operation of those mechanisms.

9.0 Conclusions

9.1 The original destruction appears to have been the incautious act of a newly-elected government trying to escape the consequences of an ill-conceived decision of its predecessor. Like a mini-Watergate, the real harm came not from the original decision but from subsequent efforts to justify it and to minimise the damage.

9.2 The Goss government was ill-advised to have undertaken document destruction in this way. It is highly unusual, after all, for the disposal of a particular set of records (usually an administrative housekeeping matter) to be dealt with at cabinet level. The advice from Crown Solicitor O'Shea said the State Archivist's concurrence was mandatory but neither he nor any other adviser seems, at that early stage, to have considered the question whether the Archivist's discretion involved a consideration of issues in any way related to the government's reasons for wanting to destroy the records or any reasons citizens (historians apart) might have for wishing them to be preserved. So far as those reasons were concerned, the Archivist appears to have been treated as rubber stamp.

9.3 It was only subsequently, when the whistleblowers concerned voiced their objections and refused to be put off, that the Queensland Government, the Crown Solicitor, and the QCJC developed and articulated theories about the nature of the Archivist's discretion and her proper role. At each stage in the development and defence of their position, the persistence of the whistleblowers compelled them to advance more and more outrageous arguments in order to sustain the flawed logic of the official Queensland position.

9.4 Finally, the official Queensland position collapses under its own internal contradictions. On the one hand, the State Archivist has an unfettered discretion to destroy records, potentially the power to retain or approve the destruction of official records on any grounds she chooses, arbitrarily, or by whatever whim takes her fancy in the passing moment. On the other hand, she is most severely limited to a consideration of historical value and it is not her proper function to consider any other ground for retention. The first proposition is based on the absence of any "legal/legislative provision" bearing on the matter and the second is advanced despite the absence of such provision restricting the archivist's discretion in the way suggested.

9.5 The professional associations – the Australian Society of Archivists (ASA) and the Records Management Association of Australia (RMAA) - have long argued the propriety of submitting records disposal practices to professional review in the interests of public accountability (not just preservation of an historical record). Nowhere has the opposing case (that governments are free to destroy records at their own discretion subject only to a consideration of historical value and that State archives authorities have no role to play in support of accountability) been so strongly and persistently placed on the public record. It cannot be allowed to stand. ASA and RMAA should take up the challenge and do whatever is necessary to place on the public record their opposition to the stance taken by the Queensland authorities in the Heiner case.

Endnotes

Unless otherwise stated, references to Submissions and Transcript refer to the volumes of material compiled by the Senate Select Committee on Unresolved Whistleblower Cases. The Committee's report *The Public Interest Revisited* is referred to by title only.

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For further reading:

- What happened next: An up-dating [summary](http://caldeson.com/old-site/RIMOS/summary.html) of events surrounding the destruction of the Heiner Inquiry documents since 1990, available here at <http://caldeson.com/old-site/RIMOS/summary.html>.
- The Aus-archivists Listserv Archive where debate has raged, <http://www.asap.unimelb.edu.au/asa/aus-archivists/maillist.html>
- See also *The Justice Project*, an internet initiative of the staff and students of the School of Journalism and Communication, The University of Queensland <http://justiceproject.net/content/default.asp>.
- The *Queensland Independent*, until 1998 called the *Weekend Independent*, published by the Department of Journalism at the University of Queensland, Brisbane, where a campaign has been waged, <http://www.uq.edu.au/jrn/tqi/>.
- The *Connolly/Ryan Judicial Review into the Effectiveness of the Criminal Justice Commission*, <http://www.uq.oz.au/jrn/twi/shrd75.htm> (177 kilobytes).
- The Queensland Senate Committee of Privileges 1998 report on "*Further possible false or misleading evidence before select committee on unresolved whistleblower cases*" at http://www.aph.gov.au/senate/committee/priv_ctte/report_71/index.htm (35 kilobytes).
- The Hansard report of the Queensland State Parliament debate on a Motion of Confidence on July 30, 1998, at <http://www.parliament.qld.gov.au:81/hansard.htm> (657 kilobytes).
- Australian TV Channel 9's February, 1999, "Sunday" programme report of the Affair, interviews with Lindeberg and others. A transcript was mounted at <http://sunday.ninemsn.com.au/>.
- Hansard's report of the Queensland State Parliament debate on a call by the Opposition for an Inquiry on March 4, 1999, at <http://www.parliament.qld.gov.au:81/hansard.htm> (343 kilobytes).
- Australian Society of Archivists' "*The Heiner Affair - A Position Statement*" in the Aus-archivists listserve archive at <http://www.asap.unimelb.edu.au/asa/aus-archivists/msg03105.html>.

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